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October 27, 2003

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: Tariff Transmittal No. 03-87 – Verizon Massachusetts' Revisions to D.T.E. MA Tariff No. 17

Dear Ms. Cottrell:

Verizon Massachusetts ("Verizon MA") files this letter in response to comments of Covad Communications Company ("Covad") and RCN-BecoCom, LLC ("RCN")[1] regarding the Company's proposed revisions to D.T.E. MA Tariff No. 17, filed on October 2, 2003, to implement certain rulings of the Federal Communications Commission ("FCC") in its *Triennial Review Order*. As discussed below, these parties' claims are without merit and, therefore, there are no grounds to suspend and investigate Verizon MA's October 2nd compliance filing. Accordingly, the Department should approve Verizon MA's proposed revisions as filed.

Covad Communications Company

In its comments, stylized as a "Complaint," Covad contends that Verizon MA's tariff revisions incorrectly implement the FCC's *Triennial Review Order* concerning line sharing. Covad Comments at 1. Covad's claims are unfounded.

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[1] Covad filed its comments on October 16th but failed to serve Verizon MA. We only became aware of the comments late last week. RCN filed its comments late. Several other carriers (Sprint, Choice One, and Broadview Networks) also filed comments, some of which were not served on the Company. However, their comments contain only conclusory assertions that the Department should set a different implementation date for the proposed tariffs or conduct a further inquiry, and a response by Verizon MA to their assertions is not necessary.

In its *Triennial Review Order*, the FCC vacated its rules requiring line sharing and established a new federal regulatory framework for line sharing to which the Department must adhere. *Triennial Review Order*, ¶ 257-58, 261. Under the FCC's new rules, the high frequency portion of a copper loop ("HFPL") is not an unbundled network element ("UNE") under Section 251 of the Telecommunications Act of 1996 (the "Act"), even on a transitional basis.[2] Moreover, pursuant to Section 201(b) of the Act, the FCC imposed transitional rules on line sharing arrangements provided by incumbent local exchange carriers ("LEC") (*i.e.*, grandfathering provisions and a three-year transition for existing and new line sharing arrangements, respectively). *Triennial Review Order*, ¶¶ 179, 264-65, 267.

Verizon MA's October 2nd tariff filing fully complies with the FCC's directives to eliminate the unbundling requirement for the HFPL and grandfather existing line sharing arrangements.[3] Contrary to Covad's claims, Verizon MA's tariff revisions do not impose additional limitations on competitive local exchange carriers ("CLECs") with existing line sharing arrangements. Covad Comments at 1-2. Verizon MA's proposed tariff language clearly reflects the FCC's intent to minimize customer disruption by grandfathering line sharing arrangements that CLECs provided as of October 2, 2003, to end-user customers at *existing* rate levels.[4] *Triennial Review Order*, ¶ 267. Thus, no

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[2] The FCC specifically stated that "[b]eginning on the effective date of the Commission's *Triennial Review Order*, the high frequency portion of the copper loop shall no longer be required to be provided as an unbundled network element, subject to the transitional line sharing conditions in paragraphs (a)(1)(i)(A) and (a)(1)(i)(B) of this section." *Triennial Review Order*, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i).

[3] Under the FCC's rules:

> [a]n incumbent LEC shall provide a requesting telecommunications carrier with the ability to engage in line sharing over a copper loop where, prior to the effective date of the Commission's *Triennial Review Order*, the requesting telecommunications carrier began providing digital subscriber line service to a particular end-user customer, and has not ceased providing digital subscriber line service to that customer. Until such end-user customer cancels, or otherwise discontinues its subscription to the digital subscriber line service of the requesting telecommunications carrier, or its successor or assign, the incumbent LEC shall continue to provide access to the high frequency portion of the loop at the same rate that the incumbent LEC charged for such access prior to the effective of the Commission's *Triennial Review Order*.

Triennial Review Order, Appendix B, Final Rules at ¶ 10, 47 C.F.R. § 51.319(a)(1)(i)(A). The FCC further directed incumbent LECs to charge the same rates as those charged prior to the effective date of the *Triennial Review Order*, until the next biennial review period commences in 2004. *Id*. at ¶ 264. The FCC stated that "[t]he interim grandfathering rule will help to alleviate the impact of such a significant change on end-user customers." *Id*.

[4] This contradicts Covad's contention that line sharing must be priced at TELRIC based rates. Covad Comments, at 9-10.

modification to Verizon MA's proposed tariff language is required, as Covad erroneously suggests.

Likewise, Covad incorrectly contends that Verizon MA should be required to incorporate in its tariff all rates, terms and conditions applicable to line sharing. Covad Comments at 2, 4-5. This is inconsistent with the FCC's directives. In its *Triennial Review Order*, the FCC recognized that modifications to interconnection agreements would be required in response to that *Order*, and declared that individual carriers should be allowed the opportunity to negotiate to make the necessary contract changes. *Triennial Review Order*, ¶¶ 700-703. Accordingly, Covad's argument that Verizon MA must be required to tariff applicable line sharing rates, terms and conditions is erroneous and must be rejected by the Department.

Finally, Covad argues that the Department has the authority to reject the FCC's declaration to eliminate the unbundled requirement for HFPL. Covad Comments at 5-8. That argument is wrong.

The FCC clearly has authority, under Section 251(d)(3) and "long-standing federal preemption principles" to preclude states from adding to the list of network elements established by the FCC – which list does not include the HFPL.[5] *Triennial Review Order*, ¶ 192. And, in fact, the FCC has exercised that authority and preempted state attempts to override its decision to remove certain network elements from the national list of UNEs. *Id.* at ¶¶ 193-95. In its *Triennial Review Order*, the FCC delegated limited authority for state commissions to apply a more granular impairment analysis *only* for switching and certain types of loop facilities and dedicated transport – *not* for the HFPL, which is no longer a UNE on a national basis.[6] *Id.* at ¶ 193. Thus,

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[5] As the U.S. Supreme Court has recognized, where Congress or a federal agency has made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted," states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000). In other words, where federal law sets forth a legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns. *See e.g., Fidelity Fed'l Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]"). *See also Wisconsin Bell, Inc. v. Bie*, 2003 U.S. App. LEXIS 16514, *9 (7th Cir. August 12, 2003) ("A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law.").

[6] The FCC found that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers, including small entities." *Triennial Review Order*, ¶ 187. Contrary to Covad's claims, a separate declaratory ruling by the FCC is *not* a prerequisite to preemption under Section 251(d)(3). Covad Comments, at 16-17. Rather, the remedy of a declaratory ruling is meant to provide guidance in close cases. This is not a close case. Any attempt by the Department to require the unbundling of HFPL

because the Department is not at liberty under the Supremacy Clause to frustrate or disregard that federal policy,[7] Covad's comments provide no basis for the Department to suspend the proposed tariff.

RCN Comments

The specific tariff change RCN addresses is the elimination of the Synchronous Transport Signal – Level 1 (STS-1) interoffice unbundled network element.[8] RCN asserts that it uses STS-1 facilities for network interconnection with Verizon MA and that nothing in the FCC's *Triennial Review Order* relieves Verizon MA from its obligation to provide these interconnection facilities and to do so at TELRIC rates. RCN's position flies in the face of the FCC's *Triennial Review Order* and provides no cause for the Department to suspend the proposed tariff changes.

As RCN notes in its comments, the facilities at issue here are those between a Verizon MA office and a CLEC network. The FCC could not have been clearer in the *Triennial Review Order* that SONET facilities like STS-1 or any facility connecting switches of an incumbent LEC and a CLEC are *not* network elements that an incumbent LEC must provided on an unbundled basis.

First, RCN asserts that the bandwidth of STS-1 facilities is comparable to DS-3 facilities to which Verizon is still required to provide unbundled access. RCN Comments at 2-3. RCN ignores that STS-1 is a SONET facility, and the FCC expressed ruled that ILECs are not impaired without access to SONET transport. The FCC stated: "… we find that dark fiber and multiple DS3 circuits provide reasonable substitutes for OCn interface circuits at these capacities and find that requesting carriers are not impaired

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would conflict with the FCC's *Triennial Review Order*.

[7] Covad erroneously relies on the Sixth Circuit Court of Appeals' opinion in *Michigan Bell v. MCIMetro* to support its contention that states may require access to additional UNEs as long as the regulations "would not interfere with the ability of new entrants to obtain services." Covad Comments, at 17-18. This is a grossly overbroad reading of the *Michigan Bell Order*. In that case, the "state regulation" at issue was a tariff provision that permitted CLECs to submit resale orders by facsimile. It was in that context, and that context *only*, that the Sixth Circuit determined that faxing orders did not "substantially prevent implementation" of the federal regime. *Michigan Bell v. MCIMetro*, 323 F.3d 348, 361 (6th Cir. 2003).

Nothing in the *Michigan Bell Order* stands for the proposition that a state may require access to "services" where the FCC has expressly determined on a national basis, that competitors are not impaired without unbundled access. *Triennial Review Order*, ¶ 258. To the contrary, the Sixth Circuit reiterated its prior holding in *Verizon N., Inc. v. Strand* that "even in the case of a shared goal, the state law is preempted 'if it interferes with the methods by which the federal statute was designed to reach its goal.'" 309 F.3d 935, 940-41 (6th Cir. 2002), quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). Therefore, nothing in the *Michigan Bell Order* supports Covad's argument that the Department has the authority to require unbundled access to HFPL or otherwise disrupts the federal framework established in the FCC's *Triennial Review Order*.

[8] DTE MA No. 17, Miscellaneous Network Services, Part B Section 2, Page 2, First Revision Canceling Original, § 2.1.1.E.

without OCn or *SONET interface transport*." *Triennial Review Order*, ¶ 389 (emphasis added). The FCC did not give state commissions any authority to overturn or modify this non-impairment finding.

Second, RCN's claim that it has a right to obtain unbundled interoffice facilities between its switch and a Verizon MA switch for the purpose of interconnection is also incorrect. The FCC ruled that such facilities were not elements that an ILEC must unbundle so that a CLEC can connect its network to the Verizon MA network. *Id.*, ¶ 366. To the extent that the current tariff provides for dedicated unbundled transport for interconnection, the *Triennial Review Order* has eliminated that obligation. RCN's reference to a Department ruling in D.T.E. 01-20 is misplaced since the Department dealt there with the right of CLECs under then existing FCC rules to use unbundled interoffice transport for interconnection – a right that the *Triennial Review Order* eliminated.[9]

For the foregoing reasons, there is nothing in the comments of Covad and RCN that provide a basis for the Department to suspend Verizon MA's proposed tariff filing of October 2, 2003. The simple fact is that these carriers are dissatisfied with findings that the FCC made in the *Triennial Review Order* and want the Department to investigate issues that the FCC resolved. The Department should not take the bait but should approve Verizon MA's proposed tariff changes as filed.

Sincerely,

Bruce P. Beausejour

cc: Michael Isenberg, Director – Telecommunications Division
Paula Foley, Assistant General Counsel, Hearing Officer (DTE 03-60)
Jesse Reyes, Esquire, Hearing Officer (DTE 03-59)
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[9] RCN's argument is based on nothing more than the novel and erroneous theory that section 251(c)(2) of the Act gives it an independent right to demand that Verizon MA provide at TELRIC rates *any* facility that RCN needs in its network to interconnect with Verizon MA's network. That is not the law. By its plain terms, section 251(c)(2) obligates Verizon MA to enable RCN to connect *its* facilities and equipment to Verizon MA's network for the exchange of traffic at any technically feasible point, at a parity level of service, and at reasonable rates. Nothing in the section (or in any FCC ruling construing the section) requires that an ILEC provide a CLEC with the actual interconnection facilities. An ILEC's obligation to provide facilities to CLECs under the Act arises solely under the section 251(c)(3) unbundling requirement. As noted above, the *Triennial Review Order* provides that an ILEC does not have to provide STS-1 facilities in any circumstance and does not have to provide dedicated transport connecting its switches with CLEC switches. For its interconnect facilities, RCN can build its own, obtain them from a third party, or order a special access service from Verizon MA.